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No. 92-533

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

NICOLE ADAMS, A Minor Child,
By and Through Her Next Friend BETTY RIDGELL, and
BETTY RIDGELL, as Representative of the
Estate of JULIA ALICE ADAMS,

Petitioners,

vs.

THE CHILDREN'S MERCY HOSPITAL and
JANE JELINEK-BOOZALIS, M.D.,

Respondents.

BRIEF OF THE MISSOURI STATE MEDICAL ASSOCIATION AND THE AMERICAN MEDICAL ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

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QUESTIONS PRESENTED

Does this Court have jurisdiction to issue a writ of certiorari, pursuant to 28 U.S.C. Section 1257, when the specific constitutional questions at issue were not presented to the state court below, in a timely manner, to enable the state court to pass on those questions?

Is a substantial federal question presented by the Petition for Writ of Certiorari in light of the fact that this Court has refused to review similar statutes from other states limiting damage awards in medical negligence cases on the grounds that no substantial federal question was presented thereby?

Is the Due Process Clause of the Fourteenth Amendment violated by a state statute which merely modifies, but does not abrogate, a common law cause of action?

Is the Equal Protection Clause of the Fourteenth Amendment violated by a state statute which, in limiting recovery of non-economic damages in medical malpractice actions, neither impacts a suspect class nor impairs on a fundamental right?

PARTIES TO THE PROCEEDING

The parties to these proceedings are as indicated in the caption of the Petition for Writ of Certiorari, with the exception of Suzanna Roushar, R.N., and Cynthia Dooley, R.N. Petitioners have listed Ms. Roushar and Ms. Dooley as parties although they did not participate in the appeal in the Missouri Supreme Court below.

Both Ms. Roushar and Ms. Dooley received verdicts in their favor in the trial of this cause. Petitioners, plaintiffs below, did not preserve any claim of error as to either of those defendant's verdicts. The time for preserving any such claim of error for appeal has long since passed. Neither Ms. Roushar nor Ms. Dooley joined in the hospital's appeal in the Missouri Court of Appeals. Therefore, they are not parties to this appeal and are no longer parties to this action.

In addition, the Missouri State Medical Association and the American Medical Association are filing a brief as Amici Curiae in support of respondents.

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INTEREST OF *AMICI CURIAE*

The Missouri State Medical Association is a private, voluntary, non-profit organization of physicians and medical students. It was founded in 1850 to serve its members through promotion of the science and art of medicine, protection of the health of the public, and betterment of the medical profession in Missouri.

The Missouri State Medical Association has 5,500 physician and medical student members, comprising approximately 80% of the physicians in Missouri.

The American Medical Association, a private, voluntary, non-profit organization of physicians, was founded in 1847 to promote the science and art of medicine and the improvement of the public health. Its 280,000 members practice in all fields of medicine.

The statutory provisions of Chapter 538 of the Revised Statutes of Missouri, including Section 538.210.1, now at issue before this Court, have an important and unique history. It is unique in that these legislative enactments were the fruit of much labor, negotiation and compromise among all of the parties touched by the medical malpractice insurance crisis. These negotiations took place between the Missouri Association of Trial Attorneys, representatives of Missouri's malpractice insurance companies and a coalition of health care provider organizations consisting of the Missouri State Medical Association, the Missouri Hospital Association and the Missouri Association of Osteopathic Physicians and Surgeons. Together, they sculpted a legislative package which all parties agreed would be the most beneficial to the interests they represented and to the continued integrity of the health care industry as a whole.

In December of 1985, the compromise agreement and legislative proposal was communicated to the Missouri Senate Interim Committee on Medical Malpractice and Products Liability, which had been gathering information of its own on the crisis. Realizing the importance of the agreement reached, the legislature adopted the proposed legislative package and enacted it into law as Senate Bill No. 663, with an emergency clause, in January 1986. On February 3, 1986, the bill was signed into law by Governor John Ashcroft and became immediately effective.

The purpose of this brief is to provide background information on the relevant facts leading up to the passage of Senate Bill No. 663, the Medical Malpractice Reform Act of 1986, as it is now embodied within Chapter 538 of the Revised Statutes of Missouri. It is also the purpose of Amici to address the reasons why this legislation, and specifically Section 538.210 RSMo. (1986), is not only reasonable and necessary, but also constitutional as applied. The Missouri State Medical Association, with the support of the American Medical Association, played an integral part in the passage of these statutes and are strongly supportive of the affirmative impact which they are having in helping to alleviate the medical malpractice insurance crisis in Missouri.

SUMMARY OF THE ARGUMENT

The petitioners are asking this Court to invoke its jurisdiction pursuant to 28 U.S.C. Section 1257(a) and review the constitutionality of Section 538.210[1] under the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Basic to the analysis under both of these constitutional provisions is whether the Missouri Legislature had a rational and legitimate purpose in enacting this statute.

As Amici Curiae, the Missouri State Medical Association and the American Medical Association bring to this Court the unique historical events which led the legislature to pass this statute in 1986.

In the mid 1970s and again in the early 1980s, health care providers in Missouri experienced extreme difficulty in obtaining affordable malpractice insurance. A primary cause of this disruption in the medical liability insurance market was that the numbers of malpractice claims being filed skyrocketed during these periods. At the same time, the average magnitude of pay-

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[1] All statutory cites are to the Revised Statutes of Missouri (RSMo.) unless otherwise indicated.

outs on medical liability claims was also escalating dramatically. In response to these factors, health care providers began to drastically limit their practices. Fees for most medical services increased, while others, particularly in specialty and high risk areas of practice, became totally unavailable in many regions of the state.

In an effort to curb this crisis, the Missouri Legislature passed the Missouri Medical Malpractice Reform Act, now embodied in Chapter 538 of the Revised Statutes of Missouri. The provisions of Chapter 538 are the result of a carefully negotiated compromise agreement among the state's health care providers, trial attorneys and insurance companies, as well as a response to information gathered by a Senate Interim Committee which held eight hearings throughout the state and heard testimony from over 100 witnesses.

Against this historical backdrop, it is clear that the legislature did, in fact, enact this legislation for the reasonable and legitimate purpose of ensuring the continued viability and availability of affordable health care in Missouri. Not only is the legislation rationally, if not substantially, related to this purpose, but statistical data provides compelling proof that the legislation is indeed bringing about its desired effect.

ARGUMENT

Medical Malpractice: The Problem

In recent years, the number of medical malpractice claims and the size of jury awards have grown at an unprecedented rate. The effect of increases in claim frequency and severity was felt by physicians nationwide in the early 1970s. By 1974, physicians in several states began to experience severe problems in obtaining malpractice insurance. Notwithstanding substantial premium increases, a number of insurers left the market entirely, and some health care providers were simply unable to secure liability insurance at any price. These factors led to what many have labeled as a "crisis" in malpractice insurance.

In an effort to address this crisis in Missouri, the General Assembly enacted a tort reform package in 1976 which included a new medical malpractice statute of limitations which utilized an occurrence accrual date (Section 516.105); establishment of a pretrial screening panel (Section 538.010-080) (Repealed 1984); and a prohibition against the inclusion of any dollar amount in the demand clause of a medical malpractice petition (Sup. Ct. R. 55.06).

These statutory enactments represented a first step in the attempt to curb the rising tide of problems affecting health care providers. But they did not do enough, resulting in a second crisis period in the early 1980s. The number of medical malpractice claims filed per year in Missouri rose from 832 in 1981 to 2,074 in 1986[2]. This represented an increase of 249% over just five years.

Concern began to grow among the general public and the Missouri General Assembly over the continued deliverability of

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[2] Missouri Medical Malpractice Insurance Report, Missouri Department of Insurance, Statistical Section.

health care services and the increased cost of health care. It was clear that greater steps were needed in order to meet the medical malpractice crisis head-on.

On May 20, 1985, the Missouri Senate established an Interim Committee to gather information on the medical malpractice issue and consider alternative solutions to the problems relating to medical practice.[3] Their task was to find a balance between society's desire for affordable health care and the desire to justly compensate tort victims.

The Interim Committee utilized three methods of gathering its information: 1) it held eight public hearings throughout the state; 2) it obtained and reviewed reports, articles and surveys on the problem; and 3) it conducted surveys of its own.[4]

The Committee began its task by learning what the many causes were for the rapid increase in medical malpractice claims. At hearings held throughout Missouri, the Committee heard testimony from over 100 citizens ranging from health care providers, insurance representatives and attorneys, to victims of medical malpractice. Testimony was also received from representatives from the Missouri Division of Insurance and the Missouri Board of Registration for the Healing Arts.[5] As a result of these hearings, the Committee found that Missouri was facing not only an insurance crisis, but a reinsurance crisis as well.[6]

---

[3] The Committee also reviewed issues relating to products liability cases, but concentrated on the medical malpractice area. The Committee was unable to make any conclusions or recommendations relating to products liability. Only those findings of the Committee which pertain to medical malpractice will be addressed in this brief.

[4] Report of the Senate Interim Committee on Medical Malpractice and Products Liability, Page 2.

[5] *Id.*

[6] Terry, *Missouri's Malpractice Concord*, 51 Mo.L.Rev. 457 (1986)

Multiple causes and effects of the crisis in the health care industry were discovered by the Committee. First, although medical treatment procedures have become more sophisticated, medicine is still not an exact science. Each patient responds differently to the same medical procedures, therefore, the results of any one procedure cannot be guaranteed. Additionally, the increasing complexity of medical procedures has brought with it an increased risk of serious injury to the patient.

Another reason for the crisis was patients often carried unrealistic expectations, causing them to underestimate the risks of medical treatment. A disappointing result was assumed to be the result of medical malpractice. The increased litigiousness of society also accounted for an increase in the number of medical malpractice claims filed. Nationwide, claims frequency rose from 3.2 claims per 100 physicians prior to 1981 to 10.2 claims per 100 physicians in 1985.[7]

Many of the medical malpractice lawsuits filed against health care providers were groundless. Missouri experience was consistent with national data showing that more than half of medical liability claims closed in 1984 were dismissed with no payment to a plaintiff.[8] Testimony indicated a plaintiff would file a frivolous suit on the assumption a health care provider would prefer to settle the claim for a relatively small amount and, therefore, avoid proceeding with an expensive trial.

The contingent fee system utilized by most plaintiffs' attorneys received criticism for promoting litigation. Also, better policing of the medical profession could reduce the number of negligent and incompetent health care providers.

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[7] American Medical Association, *Socioeconomic Characteristics of Medical Practice*, p. 13, (1986).

[8] U.S. General Accounting Office, *Medical Malpractice: Characteristics of Claims Closed in 1984*, GAO/HRD-87-55, p. 19 (1987).

Finally, large settlements and awards were often the product of an overly sympathetic jury. And, although evidence of collateral sources was not admissible, many jurors rendered a verdict against a health care provider with the belief that the actual amount of damages would be paid for by an insurance company.

This combination of factors which led to the increased number of claims filed, and average cost of claims closed, consequently led to the increase in costs of malpractice insurance. From 1978 to 1985, the increase in the annual premiums paid by family practice physicians in Missouri rose an average of 296%.[9]

The Committee found that these increased costs to physicians affected patient care in four significant ways. First, the physicians' costs were being passed on to patients in the form of higher charges for services. Second, the fear of litigation prompted physicians to practice defensive medicine. Often, tests were ordered for patients even after a diagnosis or other medical judgment was actually formed, but which were necessary to generate anticipated defense exhibits documenting that medical judgment if a malpractice suit were later filed. The costs of these tests were passed on to patients as well.

Third, physicians limited their field of practice in order to avoid high risk procedures. Doctors who perform such procedures are classified according to risk of suit and required to pay higher premiums to their malpractice insurance carriers. A family practitioner, for example, could eliminate obstetrical services from his or her practice and substantially decrease the malpractice premium and the risk of incurring a claim. As an example, in 1985, only one family practitioner in the City of Springfield—Missouri's third largest city—provided obstetrical services.[10]

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[9] *Id.*, Report of Senate Interim Committee on Medical Malpractice and Products Liability, Table II, at Page 18.

[10] *Id.*, at page 24.

Fourth among these effects was an alarming loss of medical services for indigents. Again, obstetric and other high-risk patients were most often affected. From April through September of 1985, the fear of litigation and escalating malpractice premiums caused the closing of 3 of 6 county public health clinics in the southeast "bootheel" region of Missouri, and the loss of 9 of 12 staff physicians. As a result, approximately 25 women per month were being turned away for prenatal care in those counties.[11]

Health care providers were not the only people who felt that something must be done to control the medical malpractice crisis. A poll of 2,130 Americans conducted in March of 1987 by Lewis Harris & Associates, Inc., revealed that nearly all those sampled desired *some* change in the civil justice system, including decreasing the cost of lawsuits, prompt hearing of cases and a reduction in excessive damage awards.[12]

Medical Malpractice: The Solution

In response to the growing medical malpractice insurance crisis in the 1970s, 49 states enacted tort law reforms aimed at reducing claim frequency, claim severity, and the time and expense of resolving claims. Among these were measures which shortened statutes of limitation, limited damage awards, pretrial screening panels, arbitration, offsets for collateral benefits, restricted contingent fees and periodic payment of malpractice awards.

A study to evaluate the effects of these changes was conducted by the Rand Corporation in 1982, and updated in 1986. It showed that the only changes which had a measurable impact were those statutes which had *limited awards* and which had provided a

[11] *Id.*, at 25-26.

[12] Plager, S. Jay and Sundwall, David N., Department of Health and Human Services Report of the Task Force on Medical Liability and Malpractice, page 6, August 1987.

mandatory offset for collateral benefits.[13] These provisions, along with limitations on statutes of limitation resulted in reduced claim frequency and severity.[14] Pretrial screening panels were found to have no positive effects.[15]

The Missouri Solution

In 1985, Missouri's health care providers began to lobby for additional legislation to deal with the escalating medical malpractice crisis. In turn, trial attorneys were promoting their own efforts to protect the interests of injured plaintiffs and to place a moratorium on future malpractice legislation. As the two sides deadlocked, it became apparent to all concerned that a solution to this crisis could be reached only through negotiation between the various interest groups.

In the fall of 1985, a coalition of interest groups was formed to work in conjunction with the Missouri Senate Interim Committee. The parties comprising the coalition were the Missouri Association of Trial Attorneys, Missouri State Medical Association, Missouri Association of Osteopathic Physicians and Surgeons, Missouri Hospital Association, Missouri Professional Liability Insurance Association, Missouri Medical Insurance Company, and Medical Defense Association.

The coalition engaged in direct negotiations to work out a compromise for a proposed legislative package. After three meetings, an agreement was reached between the parties[16] and a

[13] Danzon, Patricia M. and L.A. Lillard, The Resolution of Medical Malpractice Claims: Research Results and Policy Implications, The Rand Corporation, R-2793-ICJ, 1982.

[14] Danzon, Patricia M., The Frequency and Severity of Medical Malpractice Claims: New Evidence, Vol. 49:NO2 Law and Contemporary Problems 57 (Spring 1986)

[15] *Id.*

[16] The full text of the agreement may be found at 83 Missouri Med. 20-21 (1986).

joint proposal was submitted to the Senate Interim Committee. Each specific provision relating to both malpractice prevention and malpractice litigation had been agreed to by each of the members of the coalition. The group further concluded that the proposal should be enacted into legislation and presented on an emergency basis, effective only on causes of action accruing after the date of enactment. If any part of the legislative package were to be declared unconstitutional, the remaining provisions would remain in effect and the members of the coalition would meet to repair and reenact the stricken provision.

On January 8, 1986, the Senate Interim Committee submitted its report and recommendations to the Missouri General Assembly. As a basis for the proposals, the report stated:

> The committee concludes that problems relating to medical malpractice threaten the quality of medical care for Missourians. The increased frequency and severity of claims against health care providers and the rapidly escalating premiums for medical malpractice insurance have affected the cost and availability of health care in this state. As a result of higher malpractice premiums and the fear of litigation, most patients pay more for medical treatment while some patients are unable to secure any treatment. Physicians have discontinued practice in specialty areas, have refused to treat high-risk patients, and have practiced costly defensive medicine.
>
> The committee believes legislative action may alleviate Missouri's medical malpractice problem. The committee recognizes that some factors exacerbating the medical malpractice problem are beyond the scope of legislative relief. Accordingly, the committee limits its recommendations to areas appropriately addressed by legislation.
>
> The committee proposes legislation that limits awards for non-economic damage. Juries would itemize malpractice [sic] awards and future damages may be structured. The

> doctrine of joint and several liability would be modified, physicians would maintain malpractice insurance in some instances, and hospitals would report problem physicians to the Missouri Board of Registration for the Healing Arts. The Board of Healing Arts would also be granted authority to immediately suspend the license of a physician upon just cause.

Report of the Senate Interim Committee, supra, at 27-28.

The report contained a listing of ten proposed legislative enactments aimed at alleviating the medical malpractice problem. The first three of those recommendations relate directly to the statutory provision now at issue before this Court. The written recommendations presented to the General Assembly by the Senate Interim Committee are clear and direct evidence of the rational legislative intent underlying the passage of what is now Section 538.210. They are quoted in pertinent part below:

> 1) Limit awards for non-economic damages to $350,000 per defendant. Non-economic damages include pain and suffering, disfigurement, loss of consortium, impairment of the quality of life, etc., but does not include exemplary (punitive) damages.
>
> Such a provision ensures that an injured person receives all economic damages caused by a health care provider. The limit on non-economic awards should alleviate the problems of affordability and availability of medical malpractice insurance.
>
> 2) The limit on non-economic awards shall be adjusted to reflect the cost of living.
>
> 3) Juries shall itemize awards. Itemized verdicts are essential to implement the provision limiting non-economic damage awards.

Report of the Senate Interim Committee, supra, at 28-29.

These and other recommendations of the Senate Interim Committee were adopted by Missouri's 84th General Assembly and enacted into law as the Medical Malpractice Reform Act of 1986, in January of that year. On February 3, 1986, the bill was signed into law by Governor Ashcroft and became immediately effective.

The provisions of the Medical Malpractice Reform Act of 1986 are now embodied within Chapter 538 of the Revised Statutes of Missouri. The cap on non-economic damages found in Section 538.210. was, and is, an integral part of that legislative package.

The Results

The Missouri solution is working. Since the passage of Senate Bill No. 663, as incorporated in Chapter 538, there have been marked decreases in the medical malpractice insurance premiums paid by health care providers in Missouri, as well as decreases in the number of medical malpractice claims filed.

Figures provided by the Missouri Department of Insurance show that the medical insurance premiums paid by physicians in Missouri in 1991 were substantially lower than the rates paid in 1988. (Appendix A). An average of the premiums charged by the four largest medical malpractice insurance carriers in the state were compiled for three physician specialties: general practice, general surgery and obstetrics/gynecology. Premiums charged by each of the four insurance companies have steadily dropped over the past four years for all physicians.

In 1988, general practice physicians paid an average of $15,090 per year for their medical malpractice insurance coverage. In 1991, that figure fell to $10,547. Also in 1988, general surgeons paid an average premium of $33,336 for medical malpractice insurance. In 1991, their average yearly premium fell to $23,167. A similar decline was reflected in premiums paid

by obstetrics/gynecology physicians, who in 1988 paid an average of $55,211 per year for medical malpractice coverage. In 1991, insurance premiums for these physicians decreased to an average yearly payment of $43,956.

In addition to the decline in physicians' insurance premiums, there has been a sharp decline in the number of medical malpractice claims reported since the passage of the enactments in Chapter 538. (Appendix B). The data for this comparison was compiled by the Missouri Medical Insurance Company (MOMEDICO), a physician owned company formed by the Missouri State Medical Association in 1978 to assure a solvent provider of medical malpractice insurance for Missouri physicians. Medical malpractice claims filed against physicians insured by MOMEDICO have fallen from a high of 262 claims in 1985 to only 137 claims in 1990.

The statistics above provide direct evidence that the Medical Malpractice Reform Act of 1986, as incorporated into the statutory provisions of Chapter 538, continue to fulfill their intended legislative purpose to alleviate the crisis in health care experienced in Missouri.

Indeed, the Missouri Supreme Court found this to be the case when it upheld the constitutionality of these provisions. Surviving both a due process and equal protection analysis, the court found that the limitation on non-economic damages in Section 538.021 "is a rational response to the legitimate legislative purpose of maintaining the integrity of health care for all Missourians." *Adams v. Children's Mercy Hospital*, 832 S.W.2d 898, 904 (Mo. 1992).

Similar provisions have likewise been upheld in several jurisdictions. *See, Fein v. Permanente Medical Group*, 695 P.2d 665 (Cal. 1985); *Lucas v. United States*, 807 F.2d 414 (5th Cir. 1986); *Davis v. Omitowoju*, 883 F.2d 1155 (3rd Cir. 1989); *Boyd v. Bulala*, 877 F.2d 1191 (4th Cir. 1989).

Petitioners herein fail to show that Section 538.210 violates the Due Process Clause or the Equal Protection Clause of the Fourteenth Amendment. Therefore, amici respectfully submit that certiorari should be denied in this case.

CONCLUSION

The State of Missouri has the paramount right to protect its citizens by fashioning a means of relief for its injured persons as well as its besieged health care providers. Through passage of Section 538.210, the state has done so through a reasonable means. Therefore, its efforts to redress the crisis in health care should not be disturbed. The petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A

OUT-STATE MATURE CLAIMS MADE RATES
500,000/1,000,000 LIMITS

	GENERAL PRACTICE	GENERAL PRACTICE	OB/ GYN
MDA	8,300	28,596	46,118
MoMED	11,389	33,416	47,345
RCA	8,924	31,263	50,149
ST. PAUL	20,360	40,071	76,962
AVERAGE	15,090	33,336	55,211
	Above as of 12/1/88		
MDA	6,415	16,534	38,309
MoMED	9,471	14,207	40,254
RCA	6,340	22,303	35,967
ST. PAUL	19,963	39,623	61,292
AVERAGE	10,547	23,167	43,956
	Above as of 12/1/91		

Compiled by Missouri Department of Insurance

APPENDIX B

MOMEDICO Rates 1983 - 1992
Mature Claims Made Rates 500,000/1,000,000

Year	Family Practice/ Normal Deliveries	General Surgery	OB/GYN
1983	$ 7,045	$11,669	$16,293
1984	8,806	14,586	20,366
1985	13,089	22,437	31,767
1986	18,327	34,034	44,506
1987	21,076	39,140	51,182
1988	22,975	42,668	55,796
1989	21,595	40,104	52,444
1990	19,183	32,883	46,585
1991	17,311	29,673	42,038
1992	17,311	24,782	42,038

MOMEDICO New Claims Reported by Calendar Year

Year	No. of Claims
1983	224
1984	255
1985	262
1986	192
1987	194
1988	158
1989	160
1990	137